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IN THE

Supreme Court of the United States

October Term, 1970

No. 47, Original

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF IDAHO,

Defendant.

BRIEF ON BEHALF OF THE COMMONWEALTH OF VIRGINIA—AMICUS CURIAE

PRELIMINARY STATEMENT

In August 1970 the United States of America by its Attorney General and Solicitor General caused to be lodged in this Court a Motion for leave to file a Complaint against the State of Idaho seeking to enjoin the State of Idaho from enforcing provisions of its Constitution and statutes which allegedly were contrary to and inconsistent with the Voting Rights Act of 1965. 79 Stat. 437, 42 U.S.C. §§ 1973-1973 (p), as amended by the Voting Rights Act Amendments of 1970, 84 Stat. 314, et seq., Pub. L. 91-285. The above mentioned Motion was subsequently granted, scheduling the filing of briefs by the respective parties and

setting the cause for oral argument on October 19, 1970. In accordance with Rule 42, of the Rules of the United States Supreme Court, the instant Brief on Behalf of the Commonwealth of Virginia, *Amicus Curiae*, is filed, within the time allowed for the filing of the brief of the party supported, defendant State of Idaho.

THE STATUTE INVOLVED AND THE INTEREST OF THE COMMONWEALTH OF VIRGINIA

Under consideration in this litigation as well as the litigation under style of *State of Texas* v. *John N. Mitchell, Attorney General of the United States* (No. 44 Original); *State of Oregon* v. *John N. Mitchell, Attorney General of the United States* (No. 43 Original); and *United States of America* v. *State of Arizona* (No. 46 Original), is the constitutionality of the Voting Rights Act Amendments of 1970, Public Law 91-285. Pertinent to a consideration of the positions taken by the Commonwealth of Virginia in the instant brief *amicus curiae* are the provisions of Title II, § 202 and Title III, §§ 301 and 302 of such Amendments which prescribe:

> "TITLE II—SUPPLEMENTAL PROVISIONS
> "RESIDENCE REQUIREMENTS FOR VOTING
>
> "SEC. 202. (a) The Congress hereby finds that the imposition and application of the durational residency requirement as a precondition to voting for the offices of President and Vice President, and the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections—
>
> "(1) denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President;
>
> "(2) denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines;

"(3) denies or abridges the privileges and immunities guaranteed to the citizens of each State under article IV, section 2, clause 1, of the Constitution;

"(4) in some instances has the impermissible purpose or effect of denying citizens the right to vote for such officers because of the way they may vote;

"(5) has the effect of denying to citizens the equality of civil rights, and due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment; and

"(6) does not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections.

"(b) Upon the basis of these findings, Congress declares that in order to secure and protect the above-stated rights of citizens under the Constitution, to enable citizens to better obtain the enjoyment of such rights, and to enforce the guarantees of the fourteenth amendment, it is necessary (1) to completely abolish the durational residency requirement as a precondition to voting for President and Vice President, and (2) to establish nationwide, uniform standards relative to absentee registration and absentee balloting in presidential elections.

"(c) No citizen of the United States who is otherwise qualified to vote in any election for President and Vice President shall be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to comply with any durational residency requirement of such State or political subdivision; nor shall any citizen of the United States be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to be physically present in such State or politi-

cal subdivision at the time of such election, if citizen shall have complied with the requirements prescribed by the law of such State or political subdivision providing for the casting of absentee ballots in such election.

"(d) For the purposes of this section, each State shall provide by law for the registration or other means of qualification of all duly qualified residents of such State who apply, not later than thirty days immediately prior to any presidential election, for registration or qualification to vote for the choice of electors for President and Vice President or for President and Vice President in such election; and each State shall provide by law for the casting of absentee ballots for the choice of electors for President and Vice President, or for President and Vice President, by all duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held and who have applied therefor not later than seven days immediately prior to such election and have returned such ballots to the appropriate election official of such State not later than the time of closing of the polls in such State on the day of such election.

"(e) If any citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any election for President and Vice President has begun residence in such State or political subdivision after the thirtieth day next preceding such election and, for that reason, does not satisfy the registration requirements of such State or political subdivision he shall be allowed to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election, (1) in person in the State or political subdivision in which he resided immediately prior to his removal if he had satisfied, as of the date of his change of residence, the requirements to vote in that State or political subdivision, or (2) by

absentee ballot in the State or political subdivision in which he resided immediately prior to his removal if he satisfies, but for his nonresident status and the reason for his absence, the requirements for absentee voting in that State or political subdivision.

"(f) No citizen of the United States who is otherwise qualified to vote by absentee ballot in any State or political subdivision in any election for President and Vice President shall be denied the right to vote for the choice of electors for President and Vice President, or for President and Vice President, in such election because of any requirement of registration that does not include a provision for absentee registration.

"(g) Nothing in this section shall prevent any State or political subdivision from adopting less restrictive voting practices than those that are prescribed herein.

"(h) The term 'State' as used in this section includes each of the several States and the District of Columbia.

"(i) The provisions of section 11(c) shall apply to false registration, and other fraudulent acts and conspiracies, committed under this section."

"TITLE III—REDUCING VOTING AGE TO EIGHTEEN IN FEDERAL, STATE, AND LOCAL ELECTIONS

"DECLARATION AND FINDINGS

SEC. 301. (a) The Congress finds and declares that the imposition and application of the requirement that a citizen be twenty-one years of age as a precondition to voting in any primary or in any election—

"(1) denies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote—a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens;

"(2) has the effect of denying to citizens eighteen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment of the Constitution; and

"(3) does not bear a reasonable relationship to any compelling State interest.

"(b) In order to secure the constitutional rights set forth in subsection (a), the Congress declares that it is necessary to prohibit the denial of the right to vote to citizens of the United States eighteen years of age or over.

"PROHIBITION

"SEC. 302. Except as required by the Constitution, no citizen of the Untied States who is otherwise qualified to vote in any State or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older."

The interest of the Commonwealth of Virginia in this litigation arises from the circumstances that both the present Constitution of Virginia (Article II, § 18)[1] and the proposed revision (Article II, § 1), Chapter 763 of the 1970 Acts of Assembly, grant the right to vote only to those qualified citizens who have attained the age of twenty-one (21) years next preceding the election in which they offer to vote. See also § 24-17 of the Code of Virginia (1950), as amended, and § 24.1-41 of the Code of Virginia effective December 1, 1970, and approved by the Attorney General of the United States in accordance with the pro-

[1] The pertinent text of all Constitutional and statutory provisions of the Commonwealth of Virginia to which the Voting Rights Act Amendments are repugnant and antagonistic are set forth in an Appendix hereto in accordance with the provisions of Rule 40 of the Rules of the Supreme Court of the United States.

visions of 42 U.S.C. § 1973(c). The Voting Rights Act Amendments, §§ 301 and 302, have usurped the right of the Commonwealth of Virginia to determine the age qualifications of her voters.

Chapter 462 of the 1970 Acts of the General Assembly of Virginia, recodified Title 24 of the Code of Virginia (1950), as amended; said recodification to become effective December 1, 1970. Title 24.1, Article 7, of the Virginia Code provides *in all elections* for absentee ballots to be cast by, among others:

> "(1) Any duly registered person who will, in the regular and orderly course of his business, profession, or occupation or while on vacation, be absent on the day of election from the county or city in which he is entitled to vote; . . ." (§ 24.1-227.)

Such individuals must apply in person for an absentee ballot not less than five nor more than forty days prior to the election in which the applicant offers to vote and must cast his absentee ballot in person before the general registrar or secretary of the electoral board not less than five days prior to the election in which he offers to vote. See §§ 24.1-227, 24.1-228, 24.1-229, 24.1-232 of the Code of Virginia (1950), as amended. Title II, § 202 of the Voting Rights Act Amendments thwarts the intent of the laws of the Commonwealth of Virginia to provide a more effective and efficient absentee voting practice free from fraud.

The Voting Rights Act Amendments, § 202, is additionally in conflict with durational residency requirements of both the present (Article II, § 18) and proposed Virginia Constitution (Article II, § 1) and registration requirements of both the present (Article II, § 20) and proposed Virginia Constitution (Article II, § 2). (See also §§ 24.1-41, 24.1-47.)

As such the pertinent provisions of the Act of immediate concern, exceed the powers vested in Congress by the Fourteenth Amendment and unconstitutionally deprive the Commonwealth of Virginia of the right to prescribe traditional qualifications—residence requirements, age, absentee registration and ballot provisions—for exercise of the elective franchise, which right is secured to the Commonwealth by the provisions of Article I, § 2, Article II, § 1, and the Tenth and Seventeenth Amendments of the Constitution of the United States.

SUMMARY OF ARGUMENT

Congress' reliance upon the Fourteenth Amendment as justification for its actions is ill founded. Such Amendment was deliberately written in terms that do not relate to the aspects of suffrage here under consideration. This was explicitly declared in Congress and has been corroborated by a series of further amendments which have specifically changed the Constitution in every instance of a change in suffrage qualifications—first race, then sex, and lastly poll tax in federal elections. The sovereign power of the States to determine such suffrage qualifications as age and residency has uniformly been recognized by this Court. Such power is recognized in the Constitution as belonging to the States.

Recent decisions have not undermined this doctrine but have merely determined that requirements: must be relevant to the purpose of voter qualifications, *Harper* v. *Va. Board of Elections,* 383 U.S. 663, 86 S.Ct. 1079, 16 L.ed. 2d 169 (1966); *Cipriano* v. *City of Houma,* 395 U.S. 701, 89 S.Ct. 1897, 23 L.ed.2d 647 (1969); *Kramer* v. *Union Free School District,* 395 U.S. 621, 89 S.Ct. 1886, 23 L.ed.2d 583 (1969); *Phoenix* v. *Kolodziejski,* 399 U.S. 204 (1970); must not invidiously discriminate by barring in perpetuity

otherwise qualified individuals, *Carrington* v. *Rash,* 380 U.S. 89, 85 S.Ct. 775, 13 L.ed.2d 675 (1965); *Evans* v. *Cornman,* 398 U.S. 419 (1970), and must allow a voter who has cast his ballot to have it fairly counted. *Reynolds* v. *Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.ed. 506 (1964).

Consequently, the power of Congress is subject to the limitations of the Constitution. The means properly available for the exercise of Congressional power are those consistent with the provisions of the Fifteenth, Nineteenth and Twenty-fourth Amendments and the Fourteenth Amendment, denial of equal protection of the laws, to strike down a requirement so arbitrary, invidious or irrational as to constitute a denial thereof. Conversely, the power of the States in limiting the franchise is subject to the same four provisions. However, age and residency requirements are not arbitrary and invidious nor have notions changed to the stage that age and residency are wholly irrelevant to voter qualifications. Such *type* of restrictions do, therefore, meet the "compelling interest standards" laid down by this Court.

Since the general type of restriction imposed is not violative of the Fourteenth Amendment, Congress cannot strike it down. Whether the particular statutory means employed to enforce the general type of restrictions is as efficient as any alternative, [i.e., age twenty-one (21) rather than age eighteen or age seventeen; one year residency rather than six months or thirty days] is a matter solely within the determinative power of the States, subject only to the limitation that it is void if shown to be "irrational," "irrelevant," "unreasonable," "arbitrary," or "invidious." Twenty-one years of age rather than eighteen years; one year's residency rather than six months', cannot be said to be arbitrary.

Since age and residency requirements are left within the power of the States and are neither arbitrary nor invidious,

the action of Congress is not appropriate, is not "consistent with the letter and spirit of the Constitution" and is thus unconstitutional and void. *Gibbons* v. *Ogden*, 9 Wheat 1, 22 U.S. 1, 6 L.ed. 23; *McCullough* v. *Maryland*, 4 Wheat 316, 17 U.S. 316, 4 L.ed. 579.

ARGUMENT

The Voting Rights Act Amendments Of 1970 Are Unconstitutional

As Mr. Justice Harlan made clear in his address dedicating the Bill of Rights Room in New York City on August 9, 1964, the framers of the Constitution:

> ". . . staked their faith that liberty would prosper in the new Nation not primarily upon declarations of individual rights *but upon the kind of government the Union was to have*. And they determined that in a *government of divided powers* lay the best promise for realizing the free society it was their object to achieve." (Italics supplied.)

Further when one remembers—as this Court pointed out in *United States* v. *Cruikshank*, 92 U.S. 542, 551, 23 L.Ed. 588 (1876)—that:

> " 'The government of the United States is one of delegated powers alone, its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the Constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be granted or secured are left under the protection of the States.' "

it necessarily follows that Congress has no power to suspend the voting qualifications—with respect to age, residency,

and the manner of casting a ballot—unless that power is conferred upon Congress by the Fourteenth Amendment.[2] That such authority is conferred upon Congress by the Fourteenth Amendment is emphatically denied.

Article I, Section 2,[3] Article II, Section 1[4] of the Constitution of the United States and the Seventeenth Amendment[5] provide that the States should set the requisite qualifications of electors for the House of Representatives, President and Vice President and Senate respectively, while the Tenth Amendment[6] reserves to the States all powers not conferred upon the Federal government.

---

[2] "The question of the appropriate powers conferred upon Congress by the Fifteenth Amendment does not arise in the present brief. The United States relies upon the Fifteenth Amendment only as justification for the enactment of Title II, Section 201 which is a nationwide suspension of literacy tests. Since Virginia presently has no literacy test, the same being suspended by the 1965 Voting Rights Act, the question of their validity is not deemed relevant for the Commonwealth's purposes. The United States relies upon the powers invested by the Fourteenth Amendment in justifying the validity of the age, residency, and absentee registration and balloting provisions of §§ 202, 301 and 302, which of course are of material concern to the Commonwealth."

[3] "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

[4] "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."

[5] "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years, and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

[6] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

A review conclusively establishes that the right to prescribe the qualifications of electors is one constitutionally vested exclusively within the province of the individual states, subject only to the limitations contained in the Federal Constitution forbidding qualifications based upon race (Fifteenth Amendment[7]), sex (Nineteenth Amendment[8]) and the payment of a poll tax in federal elections (Twenty-Fourth Amendment)[9] and invidious discriminations (Fourteenth Amendment).

(A)

THE FOURTEENTH AMENDMENT

While this Court has decided numerous recent cases in the general area of suffrage and elections, these have dealt with the effect to be given ballots cast by voters who were admittedly qualified (e.g., the reapportionment cases); the striking down of invidious discriminations, some having no relation to voter qualifications (e.g., poll tax *Harper* v. *Virginia State Board of Elections*, 383 U.S. 663, 86 S.Ct. 1079, 16 L.ed.2d 169 (1966) and more recently this Court's decision in *Cipriano* v. *City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.ed.2d 647 (1969) and others absolutely prohibiting individuals, satisfying all general requirements from ever being permitted to qualify as voters

---

[7] "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude—"

[8] "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

[9] "The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."

(e.g., Texas residency requirement in *Carrington* v. *Rash*, 380 U.S. 89, 85 S.Ct. 775, 13 L.ed.2d 675 (1965); see also *Evans* v. *Cornman*, 398 U.S. 419.)

Under these circumstances, we submit that the legislative history of the Fourteenth Amendment merits painstaking consideration. For we are considering here not requirements that were at one time related to voter qualification, the modern notions of which have changed, *Harper* v. *Virginia State Board of Elections, supra,* nor requirements which will forever bar an individual from the opportunity of participation in an electoral process; but under consideration are issues which have traditionally and still today do directly affect voter qualifications generally required of States' citizens, which qualifications are conceded to be, and which this Court has emphasized are, legitimate matters of State concern—residency and age. See, *Lassiter* v. *Northampton County Board of Elections,* 360 U.S. 45, 79 S.Ct. 985, 3 L.ed.2d 1072 (1959); *Kramer* v. *Union Free School District,* 395 U.S. 621, 89 S.Ct. 1886, 23 L.ed.2d 583 (1969).

An appeal to history is especially appropriate in the instant case when so vast and revolutionary a power is asserted by Congress as that contained in the Voting Rights Act Amendments, with no suggestion of constitutional warrant for such action other than a reliance upon one case; *Katzenbach* v. *Morgan,* 384 U.S. 641, 86 S.Ct. 1717, 16 L.ed.2d 828 (1966).

Perhaps notions of what constitutes equal protection do change. *Harper* v. *Virginia Board of Elections, supra.* This Court in 1966 struck down Virginia's poll tax as a prerequisite for voting, though historically such a requirement was a common qualification. However, both historically and presently age and residency are considered valid requirements having a direct relation to voter qualifications. Such qualifi-

cations being recognized as valid today, it becomes even more appropos to determine how such requirements were treated by the Framers of the Constitution and its Amendments. See, *Adamson* v. *California,* 332 U.S. 46, 67 S.Ct. 1672, 91 L.ed. 1903 (1947); *Ullmann* v. *United States,* 350 U.S. 422, 76 S.Ct. 497, 100 L.ed. 511 (1956); *Bell* v. *Maryland,* 378 U.S. 226, 84 S.Ct. 1814, 12 L.ed.2d 822 (1964). In the *Adamson* case Mr. Justice Black pointed out:

> "In construing other constitutional provisions, this Court has almost uniformly followed the precept of Ex Parte Bain, 121 U.S. 1, 12, 30 L.ed. 849, 853, 7 S.Ct. 781, that 'it is never to be forgotten that in the construction of the language of the Constitution . . . as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument.'"

Moreover, in the *Ullmann* case Mr. Justice Frankfurter speaking for the Court declared "nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process." Finally, Mr Justice Goldberg, in the case of *Bell* v. *Maryland, supra,* approached consideration of that situation with the following admonition:

> "Of course, our constitutional duty is 'to construe not to rewrite or amend the Constitution.' Post, page 865 (dissenting opinion of Mr. Justice Black). Our sworn duty to construe the Constitution requires, however, that we read it to effectuate the intent and purposes of the framers. We must, therefore, consider the history and circumstances indicating what the Civil War amendments were in fact designed to achieve."

Though accusations of vagueness have been applied to the Fourteenth Amendment it is conspicuously clear that

suffrage requirements were explicitly disavowed by the framers as being beyond the purpose or reach of the Fourteenth Amendment. Being so, it is not possible to now reach the qualifications under attack (which are inherently in the States' powers) except by amending the Constitution.

The proceedings in Congress are quite illuminating. Shortly after the passage of the Civil Rights Bill in 1866 Congress turned its attention to various proposals for constitutional amendments intending to implement the congressional plan of reconstruction for the South and which ultimately became the Fourteenth Amendment. Representation in the House of Representatives occupied the minds of many of the members and thus qualifications for voting were discussed. Congressman George F. Miller, a Pennsylvania Republican, alluded to the fact that "there can be no doubt that under the Constitution each State has the right to regulate the qualifications of its own electors, and Congress has no right to assume the authority." 39 Cong. First Sess. 2089 (hereinafter cited as "Globe"). Congressman Thaddeus Stephens, Republican leader of the House of Representatives, and member of the Joint Committee of Fifteen on Reconstruction, opened the debate on the proposed Fourteenth Amendment by saying:

> "This proposition is not all that the committee desired. It falls far short of my wishes, but it fulfills my hopes. I believe it is all that can be obtained in the present state of public opinion. Not only Congress but the several states are to be consulted. Upon a careful survey of the whole ground, we did not believe that nineteen of the loyal states could be induced to ratify any proposition more stringent than this." 39(1) Globe 2459.

However, he went on to state that he considered the second section the most important in the Article and it was hoped

that this section would tend to bring about universal suffrage. As he immediately stated:

> "If any State should exclude any of her adult male citizens from the elective franchise, or abridge that right, she shall forfeit her right to representation in the same proportion. The effection of this provision will be either to compel the States to grant universal suffrage or so to shear them of their power as to keep them forever in a hopeless minority in the national government, both legislative and executive." Id.

President James A. Garfield, then the Republican Congressman from Ohio, spoke in favor of the proposed amendment and stated:

> "Sir, I believe that the right to vote, if it be not indeed one of the natural rights of all men, is so necessary to the protection of their natural rights as to be indispensable, and therefore equal to natural rights.... And I profoundly regret that we have not been enabled to write and engrave it upon our institutions, and embed it in the imperishable bulwarks of the Constitution as a part of the fundamental law of the land." 39(1) Globe 2462.

Congressman Miller concurred in the views of the House that suffrage was not included in the Fourteenth Amendment but he emphasized the importance of the second section stating:

> "Now, conceding to each State the right to regulate the right of suffrage, they ought not to have a representation from male citizens not less than twenty-one years of age, white or black, who are deprived of the exercise of suffrage. This amendment will settle the complication in regard to suffrage and representation, leaving each State to regulate that for itself, so that it will be for it to decide whether or not it shall have

representation for all of its male citizens not less than twenty-one years of age." 39(1) Globe 2510.

In closing debates on the Fourteenth Amendment Representative Bingham, "the Madison of the first section of the Fourteenth Amendment," *Adamson* v. *California, supra,* 332 U.S. 46, 74 (1947) noted that:

> "The exercise of the elective franchise, though it be one of the privileges of a citizen of the republic, is exclusively under the control of the state."

Moreover, in speaking specifically of the first section Bingham declared:

> "Allow me, Mr. Speaker, in passing to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny any free man the equal protection of the laws or to abridge the privileges or immunities of any citizen of the republic, although many of them have assumed and exercised the power and that without remedy. The amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several States.
>
> "The second section excludes the conclusion that by the first section suffrage is subjected to congressional law . . . ." 39(1) Globe 2542.

After a protest by Stephens of the leniency of the amendment, the House then passed the measure. Id. at 2544, 2545. See also, 16 N.Y.U. Law Quarterly, Truth and Fiction—Fourteenth Amendment, page 35 (1938-1939).

In opening the debate of the Fourteenth Amendment in the Senate, Senator Jacob M. Howard, a Michigan Republican and member of the Joint Committee on Reconstruction, introduced the measure in the absence of the Committee

Chairman, Senator William P. Fessenden of Maine, declaring:

> "But, sir, the first section of the proposed amendment does not give to either of these classes the right of voting. The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject to a depotism [sic]." 39(1) Globe 2766.

Addressing himself to the second section of the amendment he continued:

> "It is very true, and I am sorry to be obliged to acknowledge it, that this section of the amendment does not recognize the authority of the United States over the question of suffrage in the several states at all; nor does it recognize, much less secure, the right ....
>
> "The second section leaves the right to regulate the elective franchise still with the states, and does not meddle with that right." Ibid.

At a later point during the debate Senator Howard declared:

> "We know very well that the states retain the power, which they have always possessed, of regulating the right of suffrage in the states. It is the theory of the Constitution itself. That right has never been taken from them; no endeavor has been made to take it from them; and the theory of this whole amendment is, to leave the power of regulating the suffrage with the people for Legislatures of the State and not to assume to regulate it by any clause of the Constitution of the United States." 39(1) Globe 3039.

Again debate in the Senate proceeded as it had in the House with every member understanding that the amendment was not to affect in any way the States' powers to prescribe qualifications for exercise of their right to vote.

The Fourteenth Amendment was not enacted in naivety. The Senate and House were both fully aware that many states denied suffrage to illiterate, nonresident, nontaxpayers, paupers and the like. But denial of suffrage to such persons was to be covered by the second section of the amendment; no one suggested that the first section would render such laws invalid. The following colloquy between Senator Howard and Senator Daniel Clark, a New Hampshire Republican, is illustrative:

> "MR. CLARK: . . . I wish to inquire whether the committee's attention was called to the fact that if any State excluded any person, say as Massachusetts does, for want of intelligence, this provision cuts down the representation of that State.
>
> "MR. HOWARD: Certainly it does, no matter what may be the occasion of the restriction. . . . If, then, Massachusetts should so far forget herself as to exclude from the right of suffrage all persons who do not believe with my honorable friend who sits near me [Mr. Sumner] on the subject of negro suffrage, she would lose her representation in proportion to that exclusion. If she should exclude all persons of what is known as the orthodox faith she loses representation in proportion to that exclusion. No matter what may be the ground of exclusion, whether a want of education, a want of property, a want of color, or a want of anything else, it is sufficient that the person is excluded from the category of voters, and the State loses representation in proportion. The principle applies to every one of the States in precisely the same manner. And sir, the true basis of representation is the whole population. It is not property, it is not education,

> for great abuses would arise from the adoption of the one or the other of these two tests. Experience has shown that numbers and numbers only is the only true and safe basis; while nothing is clearer than that property qualifications and educational qualifications have an inevitable aristocratic tendency—a thing to be avoided." 39(1) Globe 2767.

The last word on suffrage before the final vote in the Senate was taken was by Senator Howard who reiterated his former position that the whole system of suffrage rests with the individual states. 39(1) Globe 3039. The Senate then passed a slightly modified version of the Fourteenth Amendment. 39(1) Globe 3042. And after Congressman Stephens' last speech in favor of the amendment, expressing his general disappointment that Congress did not assume more control with regard to suffrage, the House passed the Fourteenth Amendment and sent it to the country. 39(1) Globe 3434, 3438.

All of the foregoing were public statements made and distributed throughout the country and supplied the basis for actions by the individual States in the ratification of the amendment. It is shown without question that Section One was not intended to limit in any manner or degree the power of the states to determine electoral qualifications or disqualifications. The only limitation was that of Section two, which does not prohibit the states from denying the franchise but indeed contemplates such a denial and provides a specific penalty in that event.

Shortly after the adoption of the Fourteenth Amendment, Congress took the additional step not previously thought feasible, and in 1869 the Fifteenth Amendment was proposed. It is axiomatic that the only reason for the Fifteenth Amendment was to modify the Fourteenth Amendment, to prohibit, rather than to permit, voter re-

strictions on specified grounds. By so doing it also made inoperative, to this extent, the deterrent provision in Section Two of the Fourteenth Amendment, since the prohibition made the penalty needless. The adoption of the Fifteenth, we submit, was a constitutional reiteration that the Fourteenth Amendment contained no restriction on suffrage qualifications in any respect.

Every attempt to apply federal power to the determination of the qualification to voters, a subject otherwise consistently left to the sovereign powers of the several states, has been by specific constitutional amendment. The adoption of the Nineteenth Amendment and the Twenty-fourth Amendment is corroboration by Congress and also the States, which ratified such amendments, that the Fourteenth Amendment never conferred any guarantee of voter qualification. We have this law in an established straightforward manner of repeated amendments of similar tenor establishing a canon of constitutional construction that corroborates the plain meaning of the Fourteenth Amendment proclaimed alike by its words and its history.

We do not deal here in the case at bar with the dilution of ballots cast by qualified voters; nor with requirements totally unrelated to voter qualifications nor with restrictions forever barring an otherwise qualified individual from voting. We deal only with the determination of recognized qualifications for voting in State and local elections. Qualifications which the Court has stated and restated are the primary responsibility of the States. We submit that such qualifications are left by the original Constitution and all of its amendments to the exclusive and final choice of the respective States. If a change be desired the procedure of amendment is indicated. This was clearly the view of Congress in proposing the Twenty-fourth Amendment;

"Since Congress is not given the power by the Constitution to regulate either voting qualifications or the manner of election of presidential electors, their inclusion in the amendment requires the constitutional amendment approach." H.R. Rep. No. 1821, 87th Cong. 2d Sess. 5 (1962).

(B)

JUDICIAL DECISIONS

At the outset it is imperative to be cognizant that the intrusions of Congress are in the areas of age and residency. Such requirements are strictly within the power of the States to impose. This precept has been reiterated time and time again by this Court. See, *Guinn* v. *United States,* 238 U.S. 347, 362, 35 S.Ct. 926, 59 L.ed 1340 (1915); *Pope* v. *Williams,* 193 U.S. 621, 632, 24 S.Ct. 573, 48 L.ed. 817 (1904); *Carrington* v. *Rash, supra; Lassiter* v. *Northampton County Board of Elections,* 360 U.S. 45, 51 (1959); and most recently *Kramer* v. *Union Free School District, supra.* See also, *Davis* v. *Beason,* 133 U.S. 333, 345-347, 10 S.Ct. 299, 33 L.ed. 637 (1890); *Dreuding* v. *Devlin,* 380 U.S. 125, 85 S.Ct. 807, 13 L.ed.2d 792 (1965); *McPherson* v. *Blacker,* 146 U.S. 1, 13 S.Ct. 3, 36 L.ed. 869 (1892). Cases previously decided by this Court concern themselves only with the validity of *additional* requirements other than those conceded that the State has the power to impose.

Kramer v. *Union Free School District, supra,* concerns the *additional* requirement of a New York statute that individuals otherwise eligible to vote must in certain school district elections either (1) own or lease taxable real property in the district, or (2) be parents or custodians of children enrolled in a local public school. The Court held that since the New York law permitted inclusion of many

persons having only a remote and indirect interest in school affairs while excluding others having a distinct and direct interest, the proposed objective of the statute was not being met. Consequently the section violated the equal protection clause of the Fourteenth Amendment. *Cipriano* v. *City of Houma, supra,* concerned an attack on a Louisiana statute which limited franchise of special elections, for the issuance of municipal utility revenue bond, to property taxpayers. The *additional* requirement was struck down by the Court as being violative of the equal protection clause of the Fourteenth Amendment since it involved a voting classification wholly irrelevant to achievement of the States' objective.

Again in the latest case of *City of Phoenix, et al.* v. *Kolodziejski,* 399 U.S. 204, this Court, acting pursuant to the equal protection clause, prohibited the State of Arizona from restricting the franchise to real property taxpayers in elections to approve the issuance of general obligation bonds, since the differences between the interests of property owners and non-property owners, *otherwise qualified,* were not sufficiently substantial to justify excluding the latter from voting.

Also easily distinguishable, as previously mentioned in this brief, are the cases of *Carrington* v. *Rash, supra,* and *Evans* v. *Cornman, supra. Carrington* v. *Rash* was an instance of invidious discrimination between persons satisfying all the general requirements of residency, some of whom were permitted to qualify as voters while others were absolutely prevented from doing so. In that case a sergeant in the United States Army, originally from Alabama but on duty in New Mexico, bought a house and established a family and business in Texas with the admitted intention of residing there permanently. "But for his uniform" Texas conceded his eligibility to vote. But Texas stated that no

serviceman may ever acquire a voting residence in the State so long as he remains in service. This Court held such an *additional* requirement contrary to the equal protection clause as a *permanent prohibition* against all servicemen as a class though otherwise complying with all resident requirements. The case in short did not establish any qualification requirement with which prospective voters could comply by reasonable effort but imposed a permanent disqualification on servicemen whatever their circumstances or efforts may be. Likewise, *Evans* v. *Cornman* concerned a Maryland statute prohibiting in perpetuity *otherwise qualified residents* from participating in elections merely because they resided on a federal enclave. This restriction was also struck down as violative of the equal protection law.

Harper v. *Virginia State Board of Elections, supra,* like this Court's rulings discussed above in *Kramer, Cipriano,* and *Kolodziejski,* struck down an *additional* requirement which "burdened or conditioned" the fundamental right of voting and which was found to have no relation to voter qualifications—the poll tax.

Similarly the reapportionment cases, such as *Reynolds* v. *Sims, supra,* require that an individual's ballots once cast, be entitled to equal weight thus ensuring "the opportunity for equal participation by all voters in the election of state legislators." If a person is qualified to vote, his vote may not be diluted so as to have no proper effect. See also *Baker* v. *Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.ed.2d 663 (1962); *Gray* v *Sanders,* 372 U.S. 368, 83 S.Ct. 801, 9 L.ed.2d 821 (1963); *Wesberry* v. *Sanders,* 376 U.S. 1, 84 S.Ct. 526, 11 L.ed.2d 481 (1964). None of these cases touches on the question of the power of the States to determine qualifications for voting.

Likewise while all cases mentioned concerned statutes denying the franchise to citizens *otherwise qualified by*

residence and age, none touched upon the power of the States "to impose reasonable . . . age and residency requirements on the availability of the ballot." *Kramer* v. *Union Free School Dist., supra.*

While it may be arguable whether the Framers intended the Fourteenth Amendment to govern the weighing of votes after they have been cast, or the imposition of various requirements upon already qualified voters, it is certainly clear that they did *not* intend to restrict the power of the States to determine suffrage qualifications, which had been their unquestioned prerogative since before the original Constitution was adopted.

The trend of decisions of this Court has shown a cognizance of this intent. Congress' attempt to blatantly overlook the Constitution as written and construed must be rejected.

(C)

The Tests

The Brief for the United States is conspicuously void in any mention that it is the States which are to determine the qualifications of voters, not Congress. Article I, § 2, Article II, § 1, Article I, § 4, prior to the Seventeenth Amendment and the Seventeenth Amendment itself provide that it is the States who are to determine the qualifications of electors.

There has been no Amendment of the Constitution which has conferred the right to vote on anyone. The Amendments (Fourteenth, Fifteenth, Nineteenth and Twenty-fourth) are negative in character only and merely declare that certain things *cannot* be considered by the States in prescribing qualifications for electors. This is true whether the qualifi-

cations are for State, Congressional or Presidential elections.

The right of the States to set the qualifications for its electors has been recognized by this Court time and time again.

In *Newberry* v. *United States,* 256 U.S. 232, 248, 65 L.ed. 913 (1921), this Court held prior to the Seventeenth Amendment, that Article I, § 4, defined the sole authority of Congress over elections for Congress and the Senate. It was said:

> "We find no support in reason or authority for the argument that because the offices were created by the Constitution, Congress has some indefinite, undefined power over elections for Senators and Representatives not derived from Sec. 4. 'The Government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.' "

Insofar as the *Newberry* case held federal law inapplicable to primaries, it undoubtedly has been superseded by *United States* v. *Classic,* 313 U.S. 299, 85 L.ed. 1368 (1941), but the principle just enunciated was not affected.

Similarly, in *United States* v. *Cruikshank, supra,* 592, it was held:

> "In Minor v. Happersett, 21 Wall. 178 (88 U.S., XXII, 631), we decided that the Constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the States. In U.S. v. Reese just decided (ante, 563), we hold that the Fifteenth Amendment has invested the citizens of the United States with a new constitutional right, which is, exemption from discrimination in the exercise of

the elective franchise on account of race, color or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been."

In *Guinn* v. *United States,* 238 U.S. 347, 362, 59 L.Ed. 1340 (1915), the Oklahoma "Grandfather Clause" was declared unconstitutional, which in effect imposed literacy tests in a discriminatory manner. The Court was clear to point out, however, that neither the Fourteenth nor Fifteenth Amendments had affected the power of the states to prescribe qualifications not dependent upon race. It was said:

"Beyond doubt the Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning, and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support, and both the authority of the nation and the state would fall to the ground. In fact, the very command of the Amendment recognizes the possession of the general power by the State, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals.

"Thus the authority over suffrage which the States possess and the limitation which the Amendment imposes are co-ordinate and one may not destroy the other without bringing about the destruction of both."

The effect of the Fourteenth, Fifteenth, Seventeenth and Nineteenth Amendments is well stated in an article entitled "Voting Rights", 3 Race Rel. L. R. 371, 372 (1958), viz.:

> "The effect of these constitutional provisions, however, is not to confer on any person a federal right to vote. The state, not the federal government, is still primarily responsible for voting rights; but once the state purports to give any person or class the elective franchise, the federal constitutional and statutory provisions immediately and automatically operate to limit the power of the state to determine whether it will withhold the franchise from any person or group of persons. Thus, upon the adoption of the Nineteenth Amendment, all state constitutional and statutory provisions withholding the elective franchise from women solely because of their sex were immediately null and void. See People ex rel. Murray v. Holmes, 341 Ill. 23, 173 N.E. 145 (1931); Annot., 71 A.L.R. 1332 (1931). It would seem, therefore, that the states are free to establish any requirement they may deem wise, as long as these requirements are not discriminatory nor based on sex, race, color or previous condition of servitude. As a consequence, voting rights may, and often do, vary widely from state to state."

This settled constitutional right for such variances may not now be abrogated by a "test," discussed infra, dogmatically applied.

(1)

Age and Residency

As the brief for the United States points out (p. 39) the action of Congress is based allegedly upon their power to enforce the Equal Protection Clause by a determination that the States lack a compelling interest in particular qualifications regarding insofar as pertinent here, age and

residency. The brief of Plaintiff, thus relies upon the "perceivable basis" test of *Katzenbach* v. *Morgan, supra,* the "compelling interest standard" of *Kramer* v. *Union Free School District, supra,* and rejects the test that residency requirements are permissible unless so unreasonable to amount to irrational or unreasonable discrimination. *Dreuding* v. *Devlin, supra.*

The attempt to support Congress' action by the *Katzenbach* "perceivable basis" test while at the same time putting the unwarranted burden upon the States of demonstrating a "compelling interest" ignores all other provisions of the Constitution and is itself unwarranted since there is absent any showing of a denial of equal protection.

As shown, the "letter and spirit" of the Constitution reserve to the States the right to set qualifications for its electors. To allow Congress to apply the "perceivable basis" test in a mere *ipse dixit* fashion would violate that "letter and spirit." "[S]ome appraisal of reasonableness is implicit in the requirement that there be a 'basis' for Congress' judgment." The *Supreme Court, 1965 Term,* 80:91 Harv. L. Rev. 171 n.10 (1966).

There has been no showing of any reason or justification for the intrusions of the 1970 Voting Rights Act Amendments nor can it be argued that such action of Congress is reasonable because of the lack of the States to show a compelling interest in the various qualifications under attack.

It is conceded in the Brief of the United States (pp. 34-35) that each and every State has a primary responsibility for setting voter qualifications and that in making the classifications required by such responsibility, there is a "compelling interest" in terms of the review standard in limiting the franchise to those classes which will vote responsibly and honestly. (See also concession in fn. 24 of Govern-

ment's brief p. 35.) "The standard qualifications of citizenship, age, and residency, . . . directly respond to these [compelling] interests" (Government's brief p. 35). Such qualifications and the interests arising from them are equally applicable in all elections, including Presidential elections. (See Government's brief p. 51, fn. 51.) Age and residency are inherently related to voter qualifications. They per se meet the "compelling interest" standard.

If, however, the States must show a "compelling interest" not only for the *type* of qualifications (i.e., age and residency) but also for the statutory method of carrying out such qualifications (i.e., age twenty-one rather than age eighteen; one year's residency rather than six months or thirty days), it cannot be done.

Recognizing this impossibility, this Court has never applied the compelling interest standard to various specific age and residency requirements. It has applied the standard only to "the *additional* requirements . . . which prohibit some . . . residents who are *otherwise qualified by age and citizenship* from participating in . . . elections. . . ." The standard is applicable only "to statutes denying the franchise to citizens who are *otherwise qualified by residence and age*. . . . [I]f a challenged State statute grants the right to vote to some bona fide residents *of requisite age* and citizenship and denies the franchise to others [also of requisite age and citizenship] the Court must determine whether the exclusions are necessary to promote a compelling State interest." *Kramer* v. *Union Free School District, supra.* (Emphasis supplied.)

Logically it is very easy to distinguish between the general requirements of age and residency and the additional requirements which this Court has repeatedly struck down. Age and residency do have a relation to voter qualification

and do promote the State's interest involved. The additional restrictions (e.g., payment of property or poll taxes) have been found to have no relation to voter qualification and wholly irrelevant to achievement of the State's objective.

One is understandably apprehensive of the burden which the "compelling interest" standard would place upon a State to justifiy a specific statutory implementation of a concededly valid general type of restriction. For example, it is a valid requirement to establish a minimum voting age and necessity thereof is justified. Common sense dictates the need for some minimum age. But to justify a minimum age of twenty-one and show that exclusion of those who are twenty, nineteen, or eighteen years of age is necessary to promote a compelling State interest is much more difficult and, it is submitted, impossible. To ask whether it is necessary to exclude those below twenty-one or those residing less than a year and then to decide that the statutory implementation of such exclusions are invalid because some of such individuals can be shown to be responsible, makes all franchise requirements vulnerable. Almost any classification will exclude some who do not fit within the reasons for exclusion.

It is suggested that in view of the rights of the States to set voter qualifications, in view of the fact that the history of the Fourteenth Amendment demonstrates the general suffrage requirements here under consideration have been left to the States, and in view of this Court's decisions construing the equal protection clause, the following proposed standard as outlined in "Limitations on the Voting Franchise, etc.," 143 Utah L. Rev. 150 (1970), is applicable:

> Rather than determining whether it is necessary to exclude [a specific individual] in order to promote responsible voting, the Court should apply the compelling

> interest standard to the type of restriction imposed and then ask whether the particular statutory means employed accomplishes the purpose behind the restriction as accurately and efficiently as any alternative means. If it does not, then the statutory requirement would be unnecessary to achieve that purpose.
>
> * * *
>
> The suggested analysis of any franchise restriction in terms of the compelling interest standard begins with the assumption that the franchise must be limited to maintain responsible elections. The court then should determine whether the particular type of restriction is necessary to promote this end and, finally, whether the particular classification is as fair and efficient as any other available method.

"The constitutional command for a state to afford 'equal protection of the laws' sets a goal not attainable by the invention and application of a precise formula." *Kotch* v. *River Port Pilot Commissioners,* 330 U.S. 552, 556, 91 L.ed. 1093, 67 S.Ct. 910 (1947). This is especially true with respect to a formula such as, in the case at bar, the compelling interest standard, the application of which has been shown to be beyond the "letter and spirit" of the Constitution.

Since States have a general constitutional competence to act in the area of voter qualifications and since an automatic formula would in essence allow wholesale invalidation of state laws under the Equal Protection Clause, it is submitted that distinctions drawn (between eighteen years and twenty-one years of age; between one year's residency and six months or thirty days) are valid as long as these distinctions are not "irrational," "arbitrary," "irrelevant," "unreasonable," or "invidious."

Twenty-one years of age does bear a direct relationship to responsibility and intelligence in voters; since the various

specific residency, as well as registration and absentee ballot provisions (to be discussed *infra*) do bear a direct relation to an honest and responsible election, and more importantly since such provisions apply equally to all individuals, it is a reasonable means of limiting the franchise. It is difficult to say that age twenty-one as compared to age twenty, age nineteen, age eighteen, is "irrational" or "arbitrary." It is difficult to say that one year's residency as compared to nine months, six months, three months, one month, is "irrational" or "arbitrary." In such situations the necessary relationship of the compelling interest standard must yield. The specific statutory requirement must stand. *Dreuding* v. *Devlin, supra.*

Often a legislature must choose between equally reasonable requirements and to demand that a State later prove the necessity of the particular choice would unnecessarily restrict the legislative process. It is no answer to say that Congress has spoken and made the choice, for as demonstrated *supra,* the choice is one for the States, subject only to the requirement that the choice made, be not violative of the equal protection clause. Equal protection cannot demand more of any particular requirement than that it be as fair as any other in achieving the State's interest. Age twenty-one rather than age eighteen; one year's residency rather than six months, or thirty days, is as fair as any other line to be drawn. Such requirements cannot be said to be arbitrary. If the line is to be redrawn it must be left to the respective State legislatures, similar to Virginia's whose newly proposed Constitution will require a six months' residency requirement instead of one year and allow alternatives for residency requirements in Presidential elections.

The true test must be the application of the letter and spirit of the Constitution, not the test of an inventive standard dogmatically applied.

(2)

Absentee Registration and Balloting

Both the present Constitution of Virginia, (Art. II § 20) and the proposed revision (Art. II § 2) require that all applications to register, by individuals meeting the requirements of age and residency "shall be completed in person before the registrar." See also § 24.1-47 of the Code of Virginia (1950) as amended, recently approved by the Attorney General of the United States which directs that only those "who shall apply in person to be registered . . . and who, at the time of the next general election, shall have the qualifications of age and residence required by the Constitution of Virginia" shall be registered. The only exception to such requirement is made in the case of members of the armed forces of the United States while in active service. Such individuals shall not "be required . . . to register as a prerequisite to the right to vote in any and all elections, including legalized primary elections" (Art. XVII § 1 of the Virginia Constitution). A similar provision for registration by absentee application, for servicemen, is continued in the proposed Constitution. (Art. IV Sec. 4)

However, Section 202 of the Voting Rights Act Amendment purports to grant a right of absentee registration to *all state citizens,* in Presidential elections.

The absentee ballot provisions of Virginia recently adopted and also approved by the Attorney General of the United States require, similar to registration provisions, that any otherwise qualified individual who will be absent on the day of election due to business, profession, or occupation, or due to vacation must cast his ballot in person before the general registrar or secretary of the local electoral board not less than five days prior to the election in

which he offers to vote. See §§ 24.1-227, 24.1-228, 24.1-229 and 24.1-232 of the Code of Virginia (1950) as amended. Section 202 of the Act has no such requirements and provides that an absentee ballot may be returned at any time before the closing of the polls on the day of election.

It is submitted that such requirements as registration in person or the casting of an absentee ballot in the manner prescribed by Virginia law are not *additional* requirements which this Court has previously struck down. Such requirements are procedural in nature only and do *not* contain any substantive qualification which one must meet prior to being entitled to vote.

However, if this Court is to conclude that such requirements are *additional* within the meaning of *Kramer* and consequently the doctrine of "compelling interest" is to be utilized, then there is no question that the Commonwealth of Virginia has such an interest in the implementation of procedures that will insure responsible and honest voting.

In two recent instances, and two separate elections, Citizens of Virginia have been convicted in Federal Courts in the Commonwealth of violations of election laws in the casting of fraudulent absentee ballots. *United States* v. *Weston,* 417 F.2d 181 (4th Cir. 1969), cert. den. 396 U.S. 1062 (1970); *Fields* v. *United States,* 228 F.2d 544 (4th Cir. 1955), cert. den. 350 U.S. 982, 100 L.ed. 850, 76 S.Ct. 468 (1956). Because of these occurrences, the concern they created, and the lack of effectiveness of criminal sanctions, the General Assembly of Virginia rightly felt that it was compelled to take measures that would more effectively secure absentee registration and balloting in order to prevent future violations of election processes. It, therefore, enacted the sanctions relative to absentee balloting and the method of registration previously discussed.

The Commonwealth is not asserting that it has a compelling interest in voting procedures due to the administrative tasks that may be involved. (See Plaintiff's brief, p. 59) Nor on the other hand can the United States argue that we are concerned here only with presidential elections, an especially federal event. An individual registers only once in the Commonwealth. Once registered he is entitled to vote in every ensuing local, State, Congressional, or Presidential election; to allow an individual to register affects not just "federal events."

What the Commonwealth does assert is that it has an "interest" in every election, due to far more than a possible administrativve burden; due to her obligation to ensure honest elections, by the casting of honest ballots of duly qualified citizenry.

The right to an honest ballot is as important as the franchise itself. Without honest balloting the right of franchise is meaningless. As stated in *Prichard* v. *United States*, 181 F.2d 326, 331 (6th Cir. 1950):

> "The deposit of forged ballots in the ballot boxes, no matter how small or great their number, dilutes the influence of honest votes in an election, and whether in greater or less degree is immaterial. The right to an honest count is a right possessed by each voting elector, and to the extent that the importance of his vote is nullified, wholly or in part, he has been injured in the free exercise of a right or privilege secured to him. . . ."

If the "compelling interest" doctrine is extended to the case at bar, the Commonwealth of Virginia has met the standard: (1) The facts and circumstances uncontrovertibly illustrate the need for tighter ballot security; (2) The interests sought to be protected are those of all qualified citizens, including the absentee voter himself. A compelling

interest in an efficient and effective voting practice free from fraud, is thereby shown. It cannot be thwarted by Section 202.

CONCLUSION

The actions and powers of Congress are subject to the classic utterances of Chief Justice John Marshall in the historic cases of *Gibbons* v. *Ogden,* 9 Wheat. 1, and *McCullough* v. *Maryland,* (4 Wheat. 316):

> "[t]his power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, *other than are prescribed in the constitution.*" (9 Wheat. 196).
>
> * * *
>
> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, *which are not prohibited, but consistent with the letter and spirit of the constitution,* are constitutional." (4 Wheat. 421).

As we have seen, the power of Congress to deal with State prescribed voter qualifications is severely limited by the Constitution. To require the States to justify their actions (actions which have been left within the inherent power of the States) by the application of a compelling interest standard would be inconsistent with the letter and spirit of the Constitution. The power of the States to prescribe voter qualifications is original and independent, not derivative or subordinate.

Such power is not granted to the States by any law, but remains with the States where it has existed since the formation of the Union, and it has never been lodged elsewhere. It cannot now be usurped by the dogmatic application of a standard impossible for the States to meet, nor by allegedly

"appropriate" legislation of Congress passed without any constitutional warrant.

The statutes of the Commonwealth of Virginia are not violative of Fourteenth Amendment precepts. Congress' unprecedented assertion of authority over such qualifications as age, residency and absentee registration and voting procedures, should not receive the sanction of this Court and should be declared unconstitutional and void.

Respectfully submitted,

ANDREW P. MILLER
Attorney General of Virginia

ANTHONY F. TROY
Assistant Attorney General

WALTER A. MCFARLANE
Assistant Attorney General

Supreme Court–Library Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Andrew P. Miller, Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of counsel for the Commonwealth of Virginia, as amicus curiae, in the above captioned matter, hereby certify that three (3) copies of this Brief on Behalf of the Commonwealth of Virginia Amicus Curiae have been served upon each of counsel of record for the parties herein by depositing the same in the United States Post Office with first class postage prepaid (airmail postage prepaid to defendant State of Idaho), this the 12th day of October,

1970, pursuant to the provisions of Rule 33 of the Rules of the United States Supreme Court as follows:

Honorable Robert M. Robson, Attorney General of Idaho, Office of the Attorney General, Capitol Building, Boise, Idaho 83702, counsel for defendant State of Idaho;

Honorable John N. Mitchell, Attorney General of the United States, Honorable Erwin N. Griswold, Solicitor General of the United States, and Honorable Jerris Leonard, Assistant Attorney General of the United States, Department of Justice, Washington, D.C. 20530, counsel of record for plaintiff United States of America.

ANDREW P. MILLER
Attorney General of Virginia

Constitution of Virginia, Vol. 9, Code of Virginia (1950), as amended, p. 509

"ARTICLE II.

"ELECTIVE FRANCHISE AND QUALIFICATION FOR OFFICE.

"§ 18. *Qualification of voters.*—Every citizen of the United States, twenty-one years of age, who has been a resident of the State one year, of the county, city, or town, six months, and of the precinct in which he offers to vote, thirty days next preceding the election in which he offers to vote, has been registered, and has paid his State poll taxes, as hereinafter required, shall be entitled to vote for members of the General Assembly and all officers elective by the people; but removal from one precinct to another, in the same county, city or town shall not deprive any person of his right to vote in the precinct from which he has moved until the expiration of thirty days after such removal.

"The right of citizens to vote shall not be denied or abridged on account of sex."

Constitution of Virginia, Vol. 9, Code of Virginia (1950), as amended, pp. 510, 511

"§ 20. *Who may register.*—Every citizen of the United States, having the qualifications of age and residence required in section eighteen, shall be entitled to register, provided:

"First. That he has personally paid to the proper officer all State poll taxes legally assessed or assessable against him for the three years next preceding that in which he offers to register; or, if he come of age at such time that no poll tax shall have been assessable against him for the year preceding the year in which he offers to register, has paid

one dollar and fifty cents, in satisfaction of the first year's poll tax assessable against him; and,

"Second. That, unless physically unable, he make application to register in his own handwriting, on a form which may be provided by the registration officer, without aid, suggestion, or other memorandum, in the presence of the registration officer, stating therein his name, age, date and place of birth, residence and occupation at the time and for the one year next preceding, and whether he has previously voted, and, if so, the State, county, and precinct in which he voted last; and,

"Third. That he answer on oath any and all questions affecting his qualifications as an elector, submitted to him by the registration officer, which questions, and his answers thereto, shall be reduced to writing, certified by the said officer, and preserved as a part of his official records."

Proposed Revision of the Constitution of Virginia, 1970 Acts of Assembly, Chapter 763, p. 1598

ARTICLE II

Franchise and Officers

Section 1. Qualifications of voters.

In elections by the people, the qualifications of voters shall be as follows: Each voter shall be a citizen of the United States, shall be twenty-one years of age, shall fulfill the residence requirements set forth in this section, and shall be registered to vote pursuant to this article. No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority. As prescribed by law, no person adjudicated to be mentally incompetent shall be

qualified to vote until his competency has been reestablished.

The residence requirements shall be that each voter shall have been a resident of the Commonwealth for six months and of the precinct where he votes for thirty days. A person who is qualified to vote except for having moved his residence from one precinct to another fewer than thirty days prior to an election may in any such election vote in the precinct from which he has moved. Residence, for all purposes of qualification to vote, requires both domicile and a place of abode. The General Assembly may provide, in elections for President and Vice-President of the United States, a residence requirement of less than six months and alternatives to registration for new residents of the Commonwealth.

Any person who will be qualified with respect to age to vote at the next general election shall be permitted to register in advance and also to vote in any intervening primary or special election.

Section 2. Registration of voters.

The General Assembly shall provide by law for the registration of all persons otherwise qualified to vote who have met the residence requirements contained in this article, and shall ensure that the opportunity to register is made available. Registrations accomplished prior to the effective date of this section shall be effective hereunder. The registration records shall not be closed to new or transferred registrations more than thirty days before the election in which they are to be used.

Applications to register shall require the applicant to provide under oath the following information on a standard form: full name, including the maiden name of a woman, if married; age; date and place of birth; marital status; occu-

pation; social security number, if any; whether the applicant is presently a United States citizen; address and place of abode and length of residence in the Commonwealth and in the precinct; place and time of any previous registrations to vote; and whether the applicant has ever been adjudicated to be mentally incompetent or convicted of a felony, and if so, under what circumstances the applicant's right to vote has been restored. Except as otherwise provided in this Constitution, all applications to register shall be completed in person before the registrar and by or at the direction of the applicant and signed by the applicant, unless physically disabled. No fee shall be charged to the applicant incident to an application to register.

Nothing in this article shall preclude the General Assembly from requiring as a prerequisite to registration to vote the ability of the applicant to read and complete in his own handwriting the application to register.

Section 24-17, Code of Virginia (1950), as amended, Vol. 5, p. 226

"§ 24-17. *Persons entitled to vote at all general elections.*—Every citizen of the United States twenty-one years of age, who has been a resident of the State one year, of the county, city or town, six months, and of the precinct in which he offers to vote thirty days next preceding the general election, in which he offers to vote, has been duly registered under the provisions of § 24-67, and who, at least six months prior to such election in which he offers to vote, has personally paid to the proper officer all State poll taxes assessed or assessable against him for the three years next preceding the year in which such election is held, and is otherwise qualified, under the Constitution and laws of this State, shall be entitled to vote for members of the General Assembly and all officers elective by the people. Removal

from one precinct to another in the same county, city or town, shall not deprive any person of his right to vote in the precinct from which he has moved, until the expiration of thirty days from such removal."

Section 24.1-41, Code of Virginia (1950), as amended, Vol. 5, 1970 Supplement, pp. 68-69

"§ 24.1-41. *Persons entitled to vote at all general elections.*—Every citizen of the United States twenty-one years of age, who has been a resident of the Commonwealth one year, of the county, city or town six months, and of the precinct in which he offers to vote thirty days next preceding the general election in which he offers to vote, has been duly registered unless exempted therefrom, and is otherwise qualified, under the Constitution and laws of this Commonwealth shall be entitled to vote for members of the General Assembly and all officers elective by the qualified voters. Removal from one precinct to another in the same county, city or town, shall not deprive any person of his right to vote in the precinct from which he has moved, until the expiration of thirty days from such removal.

"The qualifications of voters at any special election shall be such as are hereinbefore prescribed for voters at the next ensuing general elections."

Section 24.1-47, Code of Virginia (1950), as amended, Vol. 5, 1970 Supplement, p. 71

"§ 24.1-47. *Who to be registered.*—Each registrar shall register every citizen of the United States, of his election district who shall apply in person to be registered at the time and in the manner, required by law, and who, at the time of the next general election, shall have the qualifications of age and residence required by the Constitution of Virginia."

Section 24.1-227, Code of Virginia (1950), as amended, Vol. 5, 1970 Supplement, p. 113

"§ 24.1-227. *When absent voter may vote.*—The following persons may vote by absentee ballot in accordance with the provisions of this chapter in any election in which they are qualified to vote:

"(1) Any duly registered person who will, in the regular and orderly course of his business, profession, or occupation or while on vacation, be absent on the day of election from the county or city in which he is entitled to vote;

"(2) Any person on active service as a member of the armed forces of the United States, who will be absent on the day of election from the county or city in which he is entitled to vote;

"(3) Any duly registered person, who is the spouse of any person on active service as a member of the armed forces of the United States or who is a student, or the spouse of a student attending any school or institution of learning, or any person, or the spouse accompanying such person, regularly employed in business, profession or occupation outside the continental limits of the United States, and who will be absent on the day of election from the county or city in which he is entitled to vote; or

"(4) Any duly registered person who is ill or physically unable to attend the polls on the day of election."

Section 24.1-228, Code of Virginia (1950), as amended, Vol. 5, 1970 Supplement, pp. 113, 114

"§ 24.1-228. *Application for absentee ballots.*—It shall be the duty of the electoral board of each county or city to furnish the general registrar with a sufficient number of applications for official ballots on forms prescribed by the

State Board of Elections; and it shall be the duty of such registrars to furnish an application form, in person or by mail to any qualified voter requesting the same for the purpose of offering to vote in an election by absentee ballot.

"All applications for absentee ballots shall be made in writing to the appropriate registrar and delivered to him by the applicant in person or by mail as may be required not less than five nor more than forty days prior to the election in which the applicant offers to vote. Such applications shall be signed by the applicant under the penalty of perjury as to the facts therein stated.

"Applications for absentee ballots shall be as follows:

"(1) An application made under § 24.1-227(1), which shall be completed in person before the general registrar or a member of the electoral board only in the office of the registrar or secretary, shall be made on the form furnished by the registrar, signed by the applicant in the presence of either the registrar or a member of the electoral board and shall contain the following information:

"(a) The reason why the applicant will be absent;

"(b) The name or number of precinct in which the applicant offers to vote, and

"(c) A statement that he is a resident of and duly registered in such precinct.

" (2) An application of a member of the armed forces, made under § 24.1-227(2), or of the spouse of a member of the armed forces made under § 24.1-227(3), which shall contain the following information:

"(a) A statement that the applicant or the spouse of the applicant is on active service as a member of the armed forces of the United States and the applicant will be absent

from the county or city in which he is entitled to vote on the day of election;

"(b) The name or number of precinct in which he offers to vote and a statement that he is a legal resident thereof;

"(c) The branch of service to which he or the spouse belongs, his or the spouse's rank, grade or rate, service identification number, his home and service addresses and the date of his birth, and

"(d) In the case of the spouse of a serviceman, a statement that the applicant is duly registered in the precinct wherein the ballot will be cast.

"(3) An application made under subsections (3) or (4) of § 24.1-227 which shall be signed by the applicant in the presence of one subscribing witness, who shall subscribe the same and vouch, subject to the penalty of perjury, that to the best of his knowledge and belief the facts contained in the application as to which he has knowledge, are true and shall contain the following appropriate information:

"(a) The reason why the applicant will be absent;

"(b) In the case of a student or the spouse of a student attending a school or institution of learning, the name and address of such school or institution of learning;

"(c) In the case of a person who is ill or physically unable to attend the polls on the day of election, the nature of the illness or physical disability;

"(d) In the case of a person, or the spouse accompanying such person, who is regularly employed outside the continental limits of the United States, the name and address of his employer and his address within and outside of the United States;

"(e) The name or number of precinct in which the applicant offers to vote and a statement that he is a legal resident thereof, and duly registered;

"(f) The application shall be accompanied by sufficient postage or legal tender, as indicated thereon, to defray the cost of mailing the ballot to the applicant, if to be delivered by mail."

Section 24.1-229, Code of Virginia (1950), as amended, Vol. 5, 1970 Supplement, pp. 114, 115, 116

"§ 24.1-229. *Duty of registrar and electoral board upon receipt of application; voucher; coupon.*—The general registrar, upon receipt of the application for a ballot, if the applicant is duly registered where registration is required, shall enroll the name and address of the applicant on the list to be made and kept by him for the purpose, and shall either forward the application forthwith to the secretary of the electoral board, noting thereon that the applicant is a registered voter, if registration is required, or approve the application, note the fact of registration, and return it to the applicant for delivery to the secretary of the electoral board. If it then appears to the electoral board that the applicant is a resident and registered voter, if required, of the precinct in which he offers to vote, the electoral board shall send to the applicant by registered or certified mail, with return receipt requested, or deliver to him in person, except in the case of a person on active service as a member of the armed forces of the United States, the following items and nothing else; provided ,however, that if the applicant states as the reason for his absence on election day any of those set forth in § 24.1-227(1), the registrar or the secretary of the electoral board, upon the determination of the qualification of the applicant to vote, shall deliver the

following items only to the applicant himself in proper person and no item shall be removed by the applicant from the office of the registrar or the secretary of the electoral board:

"(a) An envelope containing the folded ballot, sealed and marked 'ballot within. Do not open except in presence of a notary public or other officer mentioned in § 24.1-232.'

"(b) An envelope for resealing the marked ballot, on which is printed the 'voucher,' in the following form:

"Voucher.

" 'This is to certify that the enclosed ballot was received by me upon my application to the registrar of the ..... (county or city) of ....., Virginia. The envelope marked "ballot within" was opened by me in the presence of ....., notary public (or other person mentioned in § 24.1-232) of the ..... (county or city), marked while in his presence, without assistance or knowledge on the part of anyone as to manner in which same was prepared, and then and there sealed as provided by law.

(Signed).....

Teste: .....
Notary Public (or other person
mentioned in § 24.1-232)'

"(c) A properly addressed envelope for the return of the ballot to the electoral board by registered or certified mail or by the applicant in person and, if available, the appropriate blank material required to register or certify the mail.

"(d) A printed slip giving instructions as to the manner of making out the voucher on the envelope for the return

of the ballot hereinafter mentioned and how the same shall be returned.

"(e) A 'coupon,' in the following form:

" 'Coupon.

" 'Name (given by voter) ....., height....., age (given by voter) ....., weight (estimated) ....., color of hair ....., color of eyes ....., birthplace (given by voter) ....., occupation (given by voter) ....., State and county or city where voter claimed to have last voted .....

" 'To the best of my knowledge, the above information is correct, and the applicant has complied with the requirements of the law as above provided. I have no knowledge whatever of the marking, erasure, or intent of the ballot enclosed.

(Signed) .....
Notary Public (or other person mentioned in § 24.1-232).'

"If the applicant is on active service as a member of the armed forces of the United States, the electoral board shall mail or deliver in person to the applicant in person the ballot as set forth in (a) above accompanied by the instruction slip set forth in (d) above. The covering envelope shall contain in the lower left-hand corner the words 'Official Virginia Armed Forces Ballot,' or such other words as the acts of Congress or regulations of the transmitting federal agency may require. A return envelope, as set forth in (c) above shall be furnished and in the lower left-hand corner shall appear the same words as on the covering envelope. In addition an envelope for use as prescribed in (b) above

shall be furnished and shall have printed thereon, in lieu of the word 'Voucher,' the following to be completed:

'Official Virginia Armed Forces Ballot.
'Voter must place ballot herein and seal.'

and upon the other side the following words:

'Oath of Voter.

'I do swear (or affirm) that I am now and have been a citizen and domiciliary resident of Virginia since the ..... day of ....., 19....., and am a resident of the (county or city) of ....., residing at ..... (street and number or place of residence therein), and am now in active service in the Armed Forces of the United States; that I am at least twenty-one years of age or will be on the ..... day of ....., 19....., and that by exercising the privilege of voting I acknowledge and accept all responsibilities and obligations of full citizenship of the Commonwealth of Virginia. The name and/or number of my voting precinct is ..... (if known, so state).

'Signature of voter: .....

'Subscribed and sworn to before me this ..... day of ....., 19.....

'Signature of officer: .....

.....

Rank and Title of Officer—
Identification No. (or other person mentioned in § 24.1-232).' "

Section 24.1-232, Code of Virginia (1950), as amended, Vol. 5, 1970 Supplement, p. 117

"§ 24.1-232. *How ballots marked and returned; ballots cast in person.*—Upon receipt of the registered or certified letter forwarded by the electoral board, the voter shall not open the sealed envelope, marked 'ballot within,' except in the presence of a notary public or other officer authorized by law to take acknowledgments to deeds or in the case of a serviceman a commissioned officer in the armed forces, and shall then and there mark, as provided in § 24.1-129, and refold the ballot without assistance and without making known the manner of marking same. He shall then and there place the ballot in the envelope provided for the purpose, seal the envelope, and fill in and sign the voucher printed on the back of the envelope in the presence of a notary public or other officer hereinabove provided, who shall witness the same in writing. This envelope, together with the coupon, which must be filled out and signed by the notary public, or other officer as herein provided, shall be enclosed within the envelope directed to the electoral board which shall then and there be sealed, and shall be registered or certified and mailed, with return receipt requested, to the electoral board, or delivered personally by the voter to the electoral board or to the general registrar.

"In the event that the applicant comes under § 24.1-227 (1), he shall follow the same procedure as set forth above except that it shall be done in person, upon receipt of the items set forth in § 24.1-229, before either the general registrar or the secretary of the electoral board, in lieu of a notary, and failure to do so will render the applicant's ballot void. Such applicant shall comply with this section and vote in person not less than five days prior to the election in which he offers to vote."